91-1841

U.S. COURT OF APPEALS
FILED
MAY 11 1992
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8155

IN RE:

BOB SLAGLE,

Petitioner.

Petition for Writ of Mandamus to
the United States District Court
for the Western District of Texas

Before JOLLY, SMITH, and DUHÉ, Circuit Judges.

PER CURIAM:

CERTIFICATE OF QUESTION
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
PURSUANT TO 28 U.S.C. § 1254(3)

STATEMENT OF THE CASE

The underlying matter involves three redistricting cases concerning the reapportionment of Texas's legislative and congressional districts, Terrazas v. Richards, Nos. A-91-CA-425, A-91-CA-426, and A-91-CA-428 (W.D. Tex). The three-judge district court has entered various substantive orders and judgments that effectively require the State of Texas to conduct elections under a court-ordered, interim redistricting plan. See Terrazas v. Richards, 1991 U.S. Dist. LEXIS 19860 (Dec. 24, 1991). The orders have been appealed to the United States Supreme Court and are pending as No. 91-1270, Richards v. Terrazas, and No. 91-1546, Slagle v. Terrazas.

Petitioner Bob Slagle, Chairman of the Texas Democratic Party, filed two motions asking the Honorable James Nowlin, a member of the three-judge panel, to recuse and raised the recusal issue again in a motion to vacate. Judge Nowlin individually denied the motions. The petitioner also filed a motion requesting the full three-judge court to review Judge Nowlin's failure to recuse. That motion was not acted upon by the three-judge court; instead, Judge Nowlin individually denied it.

On April 1, 1992, the petitoner filed in this court, as No. 92-8155, a petition for writ of mandamus asking the court to compel Judge Nowlin to disqualify himself from participating in the ongoing district court proceedings. This court sua sponte has raised the question of whether mandamus lies in the court of appeals or instead in the Supreme Court.

QUESTION CERTIFIED

Where an individual judge, who is a member of a three-judge district court panel, has denied a motion to disqualify him, does a petition for writ of mandamus to compel his disqualification lie in the United States Court of Appeals or, instead, in the United States Supreme Court?

REASON FOR THE CERTIFICATE

This question is res nova. Appeals from the orders of three-judge district courts lie in the Supreme Court, but no reported authority has considered where a petition for writ of mandamus regarding disqualification lies. In light of the fact that appeals on the merits in this matter are pending in the Supreme Court, the Court may wish to address the jurisdictional issue regarding disqualification.

QUESTION CERTIFIED.

MAY 11 1992

A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By Jane M. Puglia
Deputy

New Orleans, Louisiana

Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 1, 1992

Clerk, Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: ***In re Bob Slagle***,
No. 92-8155

Dear Sir:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, the State Respondents call to the Court's attention a decision by the Judicial Council of the Fifth Circuit which only recently appeared in the advance sheets of the Federal Reporter. It is *In re the Complaint of Thomas L. and Carol Latimer against United States Chief District Judge Barefoot Sanders under the Judicial Conduct and Disability Act of 1980*, 955 F.2d 1036 (5th Cir. Jud. Council 1992). It relates to the Court's jurisdiction here, discussed in State Respondents' Response at pages 9-12.

Sincerely,

Renea Hicks
Special Assistant Attorney General

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(512) 463-2085

pc: Counsel of record

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8155

IN RE: BOB SLAGLE,

Petitioner,

On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas

ORDER:

IT IS ORDERED that petitioner's motion for leave to file supplemental brief on the issue of jurisdiction is GRANTED.

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8155

IN RE: BOB SLAGLE, Petitioner	§	
LOUIS TERRAZAS, et.al. Plaintiffs,	§	
	§	D.Ct. NOS.
vs.	§	A-91-CA-425
	§	A-91-CA-426
	§	A-91-CA-428
BOB SLAGLE, ET AL Defendants.	§	

PETITIONER'S SUPPLEMENTAL BRIEF ON THE ISSUE OF JURISDICTION

DATED: April 10, 1992

JAMES P. ALLISON
BOB BASS
C. REX HALL, JR.
ALLISON & ASSOCIATES
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Austin, Texas 78701
(512) 482-0701 telephone
(512) 480-0902 telefax

COUNSEL FOR PETITIONER BOB SLAGLE

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

NOW COMES Petitioner, Bob Slagle, Chairman, Texas Democratic Party, by and through his attorney, and files this his Supplemental Brief on the Issue of Jurisdiction. In support of this court's jurisdiction, Petitioner would show the court as follows:

I.

This court has requested briefing on the issue of whether this petition for writ of mandamus should be heard in this court or in the U. S. Supreme Court. As outlined below, the Supreme Court has repeatedly acted to narrow the scope of its jurisdiction to review matters arising from litigation in three-judge courts. This body of law, taken as a whole, makes it clear that this Court, not the Supreme Court, has jurisdiction of this matter. Moreover, this Court has the power to correct Judge Nowlin's errors via writ of mandamus by virtue of its supervisory authority over the district judges in this circuit.

II.

THE SUPREME COURT LACKS JURISDICTION TO REVIEW JUDGE NOWLIN'S FAILURE TO RECUSE

The Supreme Court has appellate jurisdiction over the actions of three-judge courts. The source of this appellate jurisdiction is found in 28 U.S.C §1253, which provides as follows:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of

> Congress to be heard and determined by a district court of three judges.

Both this court and the Supreme Court have noted that the interpretations of this act have been the subject of some confusion. See Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 96, 95 S.Ct. 289, 293 (1974); See also Sumter County Democratic Executive Committee v. Dearman, 514 F.2d 1168, 1170 (5th Cir. 1975) (noting the "shifting standards of reviewability of the decisions of three-judge courts").

The threshold issue before this court is to identify the appropriate forum for challenging the actions of a single-judge in a case appropriate for disposition by a three-judge court. Petitioner has found no cases addressing the specific issue of recusal. However, as outlined below, in reviewing the cases dealing with review of three-judge courts, a pattern emerges which clearly supports the position that this court is the proper forum for challenging Judge Nowlin's failure to recuse.

The first principle to emerge from the cases is that the language of Section 1253 should be narrowly construed in order to minimize the mandatory docket of the Supreme Court. Gonzalez, 419 U.S. at 98, 95 S.Ct. at 294. Therefore, the Supreme Court has repeatedly stressed that it would not assume jurisdiction of a case simply because the controversy arose out of a matter properly before a three-judge court.

Among the limitations the Court has placed on its own jurisdiction is to decline to review the actions, orders and rulings of a single judge sitting on a three-judge court. As stated in Gonzalez:

> Read literally, § 1253 would give this Court appellate jurisdiction over even a single judge's order...if the 'action, suit, or proceeding' were in fact one 'required...to be heard and determined' by three judges. But we have glossed the provision so as to restrict our jurisdiction to orders actually entered by three-judge courts.

Gonzales at 96 n. 14, 95 S.Ct. at 293 n. 14, citing Ex parte Metropolitan Water Co., 220 U.S. 539, 31 S.Ct. 600 (emphasis in original). In the present case, of course, the actions and orders complained of were entered by a single judge. Therefore, the Supreme Court will clearly decline to exercise jurisdiction.

Cases other than Gonzalez reflect the Court's refusal to review the acts of a single judge. In Hicks v. Pleasure House, Inc., 404 U.S. 1, 92 S.Ct. 5 (1971), appeal was taken to the Supreme Court from a temporary restraining order entered by a single district judge in a case which properly had been certified for presentation to a statutory three-judge court. The Court noted that if a single judge oversteps his authority while sitting on a three-judge court, a court of appeals should correct his error. Id. at 3, 92 S.Ct. at 7. After so noting, the Court dismissed the appeal for want of jurisdiction. Id.

In Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 82 S.Ct. 1294 (1962), the issue was whether the district court had erroneously refused to convene a three-judge

court. On direct appeal, the court of appeals agreed that a three-judge court should have been convened, but declined to grant relief, finding that it lacked jurisdiction to do so. The Supreme Court disagreed, holding that a court of appeals is not powerless to "give any guidance when a single judge erroneously invaded the province of a three-judge court." Id. at 716, 82 S.Ct. at 1296. See also Schackman v. Arnebergh, 387 U.S. 427, 87 S.Ct. 1622 (1967); Gonzalez, at 101, 95 S.Ct. at 295-96 (single judge's failure to convene three-judge court reviewable in the court of appeals, either through petition for writ of mandamus or through a certified interlocutory appeal under 28 U.S.C. § 1292(b)).

The failure of the district judges in Idlewild and Schackman to convene a three-judge court is analogous to the situation in the present case. As noted in the Petition for Writ of Mandamus, Petitioner filed a motion in the court below asking for the three-judge panel to review Judge Nowlin's failure to recuse. This motion was never considered by the three-judge court, however. Instead, Judge Nowlin denied the order individually. Clearly, then, under the reasoning of Idlewild and Schackman, as reaffirmed in Gonzales, Judge Nowlin's failure to recuse, and the orders embracing that failure, are reviewable in this Court, not in the Supreme Court.

In at least one case, this court has recognized its power to review the ruling of a single judge sitting on a three-judge court. In Bond v. White, 508 F.2d 1401 (5th Cir. 1975), this court addressed the propriety of an award of attorney's fees in a Voting Rights Act case. In the court below, the case had been assigned to a three-judge court, which had entered a

final order on the merits of the case. Subsequently, the case was referred to a single member of the court for disposition of the issue of attorneys' fees. Referring to the body of law discussed above, this Court properly assumed jurisdiction of the appeal regarding the attorneys' fees because the order in question was entered by a single judge, notwithstanding the fact that the merits of the case had been resolved by a three-judge court.

The Supreme Court has also restricted its jurisdiction under Section 1253 in other ways which are relevant to the present case. Specifically, the Court has held that, even if the challenged order was rendered by a full three-judge court, the Court will not exercise jurisdiction to review it unless the order constitutes a resolution of the claim that made it appropriate to convene the three-judge court. E.g., MTM, Inc. v. Baxley, 95 S.Ct. 1278 (1975).

This court has acknowledged this additional restriction on the scope of the Supreme Court's jurisdiction. In United States v. State of Louisiana, 543 F.2d 1125 (5th Cir. 1976), this court assumed jurisdiction of an appeal under this theory. In that case, the appellant complained that the full three-judge court had denied his motion to intervene. Relying on MTM, Inc., this court assumed jurisdiction of the appeal because the issue of intervention was unrelated to the reason the three-judge court was convened.

In the present case, the three-judge court was convened for the purpose of reviewing Plaintiff's claim under the Voting Rights Act. The issue of Judge Nowlin's failure to recuse is not, of course, a Voting Rights Act question. Therefore, under the reasoning of both

MTM, Inc. and United States v. Louisiana, this court would be the appropriate forum for review of the issue of recusal.

As outlined above, the Supreme Court has expressly stated that it has no jurisdiction over the actions or rulings of a single judge sitting on a three-judge court. Moreover, the Court has repeatedly held that review of such matters lies in the courts of appeals, either on appeal or by way of mandamus. Finally, even if the recusal issue had been ruled upon by the three-judge court, the Supreme Court would decline to review it because the issue of recusal is unrelated to the purposes for which the three-judge court was convened. It is clear, then, that this Court, not the Supreme Court, has jurisdiction over the presently pending Petition for Writ of Mandamus.

III.

THIS COURT HAS SUPERVISORY JURISDICTION TO CORRECT JUDGE NOWLIN'S ERRORS

The All Writs Act provides, in pertinent part, that

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a). Prior to 1957, it was generally assumed that a court of appeals could issue writs only in aid of their appellate jurisdiction. However, in La Buy v. Howes Leather Co., 77 S.Ct. 309, the Supreme Court held as follows:

> We believe that supervisory control of district courts by the courts of appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here.

Id. at 315. As outlined below, the interpretation of this language in subsequent decisions makes it clear that the courts of appeals may issue writs of mandamus in aid of their supervisory jurisdiction, regardless of whether appellate jurisdiction exists.

This court clearly does have both the power and the duty to supervise the actions of the district courts within the circuit. See e.g. 28 U.S.C. §332 (creating and delineating the duties of the Judicial Council); 28 U.S.C. §372 (mechanism for addressing complaints about judicial impropriety or incapacity). These statutes specifically confer jurisdiction on this court to supervise the judicial behavior of the district courts within the circuit. It is in aid of this court's supervisory jurisdiction, as reflected in these statutes, that this court has authority to issue the writ. It is noteworthy that Congress did not choose to limit the "in aid of jurisdiction" requirement specifically to appellate jurisdiction. Jurisdiction refers, simply, to judicial power and the appropriate exercise thereof. See Will v. United States, 389 U.S. 90 (1967)(courts have never confined themselves to an arbitrary and technical definition of jurisdiction.)

The supervisory power of the courts of appeals as an independent basis for mandamus jurisdiction was recognized by this court in United States v. Hughes, 413 F.2d 1244 (5th Cir. 1969). In Hughes, the court noted that

> Several recent cases point toward an expansion of the scope of mandamus in the exercise of the supervisory control of the District Courts by the Courts of Appeal...Since we conclude that the issuance of the writ is in aid of our appellate jurisdiction in the more traditional sense, we do not rely upon a rationale of an independent supervisory power as a basis for jurisdiction.

Id. at 1247 n.1 (citations omitted).

In an earlier case, this court squarely relied on their supervisory power to grant a writ of mandamus. In Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968), several attorneys petitioned for a writ of mandamus challenging a local rule of the District Courts of the Southern District of Mississippi. The rule in question limited the pro hac vice appearances of out of state attorneys in non-fee generating civil rights cases. The petitioners sought, and obtained, a writ of mandamus declaring the rule invalid.

The respondents challenged this courts power to supervise or control the local rules promulgated by the District Court. This court responded as follows:

> These arguments are patently without merit...[T]here is no doubt of our supervisory power by the grant of a writ of mandamus to prohibit the District Court from enforcing its rule...

Id. at 244. There can be no argument that this court granted the writ in aid of its appellate jurisdiction; no reference was made to actual or potential appellate jurisdiction. Moreover, the relief sought was not directed to a particular case. Rather, Petitioners sought to change a local rule which pertained to all cases in the district. It is clear, then, that this court's mandamus power does not depend on its having appellate jurisdiction of either the parties

or the subject matter. See also In Re E.E.O.C., 709 F.2d 392 (5th Cir. 1983) (exercising supervisory mandamus power notwithstanding the fact that no appellate jurisdiction existed).

In conclusion, this Court has acknowledged that it has supervisory power over the actions of the district courts within this circuit. Moreover, it has used this power in situations where there is no issue involving traditional appellate jurisdiction. Judge Nowlin's wrongful failure to recuse is certainly a matter that requires supervision and correction by this Court. Indeed, it is precisely the type of improper exercise of judicial power contemplated when the Supreme Court acknowledged the need for supervisory jurisdiction.

IV.
CONCLUSION

The issue of Judge Nowlin's failure to recuse requires a prompt and meaningful review. As outlined in Section II, above, it is clear that the failure of Judge Nowlin to recuse is reviewable in this court, not in the Supreme Court. First, the Supreme Court will not review the actions of a single judge sitting on a three-judge court. Second, Judge Nowlin's failure to recuse is not reviewable in the Supreme Court because it does not represent a resolution of the claim which made it necessary to convene the three-judge court.

Finally, even if this court lacked jurisdiction in the traditional sense, it has the authority to correct Judge Nowlin's error pursuant to its supervisory jurisdiction over the district courts within this circuit. For the above reasons, it is appropriate for this court to assume jurisdiction.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this court accept jurisdiction of the Petition for Writ of Mandamus, and grant relief as prayed for therein.

Respectfully submitted,

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Austin, Texas 78701
(512) 482-0701 telephone
(512) 480-0902 telefax

By: _____
BOB BASS
State Bar No. 01880400

JAMES P. ALLISON
State Bar No. 01090000

C. REX HALL, JR.
State Bar No. 08745900

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was forwarded via certified mail, return receipt requested to the following on the April 10, 1992:

Mr. John N. McCamish, Jr.
McCAMISH, MARTIN & LOEFFLER
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Hon. James R. Nowlin
U.S. District Judge
200 West 8th Street
Austin, Texas 78701

Bob Bass

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

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NEW ORLEANS, LA 70130

May 12, 1992

Mr. William K. Suter, Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

No. 92-8155 - In Re: Bob Slagle

Dear Mr. Suter:

Enclosed is a Certificate of Question from the United States Court of Appeals pursuant to 28 U.S.C. § 1254(3). Enclosed also is a copy of the pleadings that have been filed in connection with this matter.

Sincerely,

Gilbert F. Ganucheau
Clerk

GFG/jmg
Enclosures
cc: Mr. James P. Allison
Mr. Renea Hicks
Mr. John N. McCamish

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

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479-3011

May 15, 1992

James P. Allison
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John N. McCamish, Jr.
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San Antonio, TX 78299-2999

Renea Hicks
P.O. Box 12548
Austin, TX 78711-2548

RE: In Re Bob Slagle
No. 91-1841

Dear Messrs. Allison, McCamish and Hicks:

The Court today received from the Clerk of the United States Court of Appeals for the Fifth Circuit a certified question which has been placed on this Court's docket as of May 15, 1992 as No. 91-1841 pursuant to Rule 19 and 28 U.S.C. 1254(3).

Enclosed are appearance forms for you to complete and return immediately to this offie.

Very truly yours,

WILLIAM K. SUTER, Clerk

By

Francis J. Lorson
Chief Deputy Clerk

gj
Enc.
cc: Clerk, U. S. Court of Appeals for the Fifth Circuit
(No. 92-8155)